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CITATIONS

406-100—70——1

In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

UNITED STATES OF AMERICA, APPELLANT

v.

GREATER BUFFALO PRESS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra,* pp. 23–43), comprising its findings of fact and conclusions of law, is not yet reported.

JURISDICTION

The final judgment of the district court (App. B, *infra,* p. 44) was entered on May 26, 1970. The notice of appeal (App. C, *infra,* p. 45) was filed on July 24, 1970. The time for docketing the appeal was extended to September 23 and subsequently extended to October 8 by orders of Mr. Justice Harlan. The jurisdiction of this Court is conferred by Section 2 of

the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Continental Can Co.*, 378 U.S. 441; *United States* v. *Pabst Brewing Co.*, 384 U.S. 546.

QUESTIONS PRESENTED

The ultimate question is whether the acquisition by the leading printer of color comic supplements of a comparably large printer of such supplements violated Section 7 of the Clayton Act. That question, in turn, involves the following subsidiary questions:[1]

1. Whether the district court defined too narrowly the relevant product market, by focusing exclusively upon the direct printing competition between the acquiring and acquired firms, and ignoring the substantial competition between the acquiring firm and the sole customer of the acquired firm.

2. If so, whether the defendant met its burden for establishing a "failing company" defense to the Section 7 charge, where the acquired firm, at the time of the acquisition, (a) had operated for thirty years under an agreement with its sole customer, which it was in the process of renogotiating, (b) was pursuing expansion plans, (c) had consistently shown after-tax profits and paid large dividends and (d) had sought only one alternative purchaser.

STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole

[1] See note 12, p. 22, *infra*.

or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

A. INTRODUCTION

In January 1961 the United States filed a civil antitrust suit charging that the acquisition in 1955 by Greater Buffalo Press, Inc. ("Greater Buffalo") of all the stock of International Color Printing Co. ("International") violated Section 7 of the Clayton Act. The complaint also alleged that Greater Buffalo, The Hearst Corporation ("Hearst"), acting through its unincorporated division King Features Syndicate ("King"), Newspaper Enterprise Association, Inc. ("N.E.A.") and a co-conspirator had conspired to restrain the sale to newspapers of printing of color comic supplements, in violation of Section 1 of the Sherman Act; that they had conspired to monopolize the sale and printing of those supplements, and that Greater Buffalo had monopolized such printing, in violation of Section 2 of the Sherman Act;[1a] and that Hearst and N.E.A. were each parties to tying arrangements involving the licensing of comic features

[1a] The government eliminated the monopolization charge against Greater Buffalo in its amended complaint filed in 1965.

and the sale of color comic supplements, which violated Section 3 of the Clayton Act.

In August 1965, before trial, a consent decree was entered against Hearst, enjoining King generally from entering into any agreement limiting competition in the printing of color comic supplements and from tying the licensing of its comic features with the sale of printing of comic supplements. Although the decree expressly permits King to quote a single price for the licensing of features and the sale of printing, it provides that if a Greater Buffalo plant is divested pursuant to a final judgment in this action, King would then be subject to certain requirements to ensure against tie-ins, including the requirement that it must quote separately its price for licensing and for printing. The decree further provides for the court's continuing jurisdiction over King for the purpose of providing such other relief as might be necessary to dissipate the effects of any antitrust violations which might be found against Greater Buffalo (Hearst Decree, paras. III (B) and (C).

After a full trial on all the issues, the district court found against the government on all charges (App. A, *infra*), and entered judgment dismissing the complaint (App. B, *infra*).[2]

[2] No appeal is taken from the district court's dismissal of the complaint against N.E.A., or its dismissal of the conspiracy claims against Greater Buffalo. The facts relevant to these allegations will be discussed only insofar as they are necessary to an understanding of the circumstances surrounding the challenged acquisition. While we believe that the court below erred in these respects as well as in its disposition of the Section 7 claim, we have concluded that, because of changed

B. THE INDUSTRY AND THE PARTIES

The weekend editions of most newspapers contain the familiar color comic supplements, containing comics, advertising and other features. The rights to the individual comic features are generally controlled by syndicates. The price for such rights is negotiated between the syndicates and the newspapers, and the rights are granted on a regionally exclusive basis (T. 1105–1108, 1823–1825, 1848).[3] In putting together a supplement, the newspaper may obtain features from different syndicate sources (T. 1108).

While obtaining feature rights for a supplement, the newspaper must simultaneously arrange for its printing. Comic supplement printing requires specially skilled personnel and specially adapted printing equipment. Although newspapers, at least the larger ones, are capable of printing their own supplements, most find that a better quality product can be obtained more economically from independent comic supplement printers (T. 798–801).

Newpapers which do not print their own supplements can have it done either by a syndicate which sells printing as an incident to its feature selling business (and, in turn, arranges with a comic supplement

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circumstances since the complaint was filed and the essentially factual basis of the court's judgment on these other claims, they do not present substantial questions warranting further review.

[3] In a group of cases filed while the instant case was under submission, *United State* v. *Chicago Tribune-New York News Syndicate*, *United States* v. *Field Enterprises, Inc.*, and *United States* v. *The Hearst Corporation*, Nos. 67 Civ. 4596–4598, S.D.N.Y., the government is challenging certain of these exclusivity provisions. The legality of such exclusivity was not involved in this case.

printer to do the actual printing) or directly by a comic supplement printer (T. 1599, 1798–99). In arranging for printing, the distance between the printer and the newspaper is a factor, since transportation costs are substantial (T. 802–03, 810).

At the time of its acquisition of International, Greater Buffalo was the most successful and efficient comic supplement printer, largely because of the technical and innovative skills of its president, Koessler. It owned no feature rights of its own, but did some printing for the feature syndicates, though most of its sales were direct to newspapers. In 1954, the last full year before the acquisition, Greater Buffalo had sales of about $8.5 million (p. 138, para. 15). Its plants were then located in Buffalo and Dunkirk, New York, but it was in the advanced stages of planning for a new plant in Lufkin, Texas, intended to facilitate and increase sales to Southern newspapers. The Lufkin plant was opened in 1958 (p. 138, para. 20).

International was also a comic supplement printer, comparable in size to Greater Buffalo, but not as efficient (T. 1289; P–62). Its owners, the Govin family, had, after an initial loan to commence operations had been repaid, made no capital investment in the company (T. 1296–97) and consistently withdrew a large portion of the accumulated profits as dividends. The dividends continued to the date of acquisition as follows: $44,700 in 1953, $34,800 in 1954 and $17,400 for the first six months of 1955 (P–141). Although claiming a working capital deficit at the end of 1954 of about $100,000 (T. 1300), the

company showed a net profit for that year of $11,000 (down from more than $70,000 in each of the four prior years) and its net profit for the year in which it was acquired (during one-half of which the company was under the control of Greater Buffalo) increased to more than $88,000 (P–141).

International, like Greater Buffalo, had annual sales of about $8.5 million at the time of the acquisition (p–138, para. 15), but employed no sales force of its own as its sole source of business was King (T. 1284–1285). Since 1926, shortly after it was founded, International operated under long-term contracts under which King sold the printing to those newspapers which purchased comic features from King. The contract in effect in 1955 was cancellable upon six-months notice and permitted King to place 25 percent of its supplement printing with other printers (primarily on the West Coast) (P–1, p. 1).

International's plants were located in Wilkes-Barre, Pennsylvania, and Peoria, Illinois (P–138, par. 8), the latter plant having been closed since the acquisition. In mid-1954, International's board of directors, prodded by King's recognition of the competitive disadvantage it would suffer when Greater Buffalo opened its Texas plant, authorized its president, Gorman, to develop plans for its own southern facility to be financed either by a favorable renegotiation of the King contract or by negotiation of a loan (P–54). Although King and International experienced difficulties in negotiating a long-term contract (P–54; T. 1310–16) and loan negotiations were not extensively

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pursued (T. 1312–13), plans for a southern plant, nevertheless, went forward. By January 1955, after extensive investigations, International had focused on Sylacauga, Alabama as a proposed site. Hearst, on behalf of King, entered into a ten-year contract to purchase newsprint from a newsprint company in that area, contingent upon construction by International of a plant there (P–56). Plans were drawn for such a plant (P–122), and by June 3, 1955, four weeks prior to the acquisition, Gorman was able to inform the Sylacauga Chamber of Commerce that "I can confidentially state that we are going to locate in Sylacauga * * *" (P–114).

King, the strongest syndicate controlling feature rights, is also the largest nonprinter selling supplement printing (P–1, p. 1, 2). In 1955, its sales of printing amounted to almost $10 million, most of which was done by International. King does not sell printing merely as an adjunct to its features business; it has at all times sought to earn a satisfactory profit on its sales of printing as well as on its sales of feature rights.

Although some of Hearst's subsidiary newspapers print their own color supplements, Hearst does not print for King (P–62). Hearst has consistently maintained, as a matter of policy, that it is not interested in getting into the printing end of the business (T. 1303). Although Greater Buffalo contended that Hearst had substantial excess color supplement printing capacity (P–62), there was evidence that conversion of such facilities to make them significantly competitive with independent color printers in handling

King's requirements was not economically feasible (P–103, 105).

In 1955, the year of the acquisition, a total of about $28 million worth of color comic supplement printing was sold to newspapers by printers and syndicates. While the record does not contain a precise breakdown of printing sales, a good picture of the relative strength of printers is given by the following breakdown by volume of printing (p–62; p–138, para. 18):

Comic Printer	Printing Volume (*In Terms of ¼-Page Sections*)
The International Color Printing Company, Wilkes-Barre, Pennsylvania	27,237,658
Greater Buffalo Press, Inc., Buffalo, New York	26,843,474
Acme Colorprint Company, San Bernardino, California	5,001,714
Eastern Color Printing Company, Waterbury, Connecticut	3,681,339
Southern Colorprint, Newport News, Virginia	477,714
World Color Press, Inc., St. Louis, Missouri	753,559
Buffalo Colorpress, Inc., Buffalo, New York	3,289,032
Fort Worth Star-Telegram, Fort Worth, Texas	1,599,556
Hearst Corporation	[4] 2,956,434

Thus Greater Buffalo and International (printing exclusively for King) together accounted for more than three-fourths of the printing done by comic supplement printers for sale to newspapers which did not do their own printing. Each did more than five times the volume of the next largest printer (Computed from P–62; P–1, P–3.)[5]

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[4] The figures included for Hearst and the Fort Worth Star-Telegram represent supplement printing done by them for other newspapers.

[5] Exhibit P–62 was compiled by the government from figures derived from International's annual industry survey (P–61, 63, 138, par. 18). Greater Buffalo contended at trial that the relevant market should include printing done by newspapers for themselves (P–62). The government objected to such inclusion on the ground that while such papers might be potential customers for the independents, they were not competitors for the business of other newspapers. Even accepting the broadest market proposed by Greater Buffalo, its share combined with International's is nearly 42 percent (P–62, column 5).

C. THE ACQUISITION

Dissatisfied with profit levels and unwilling to make needed investments for modernization and expansion, International's owners had apparently considered selling the company for several years. King was offered an opportunity to buy in 1952; although Frank Nicht, King's chief executive officer, favored the idea, Hearst declined to negotiate "at any price" (T. 1301-1303). Late in 1954, Gorman, International's president, through Nicht, obtained an introduction to Koessler of Greater Buffalo (T. 1304). Koessler expressed an interest in acquiring International, and discussions quickly proceeded to negotiations over the fair market value of the company's stock (T. 1305–06).

The record discloses that Nicht kept himself well informed concerning the progress of these negotiations. On March 25, 1955, in a memorandum to his superior, he presented the possible sale of International to Greater Buffalo as one of three possibilities, the others being renegotiation of the King-International contract at rates sufficient to finance International's southern plant, or acquisition of International by King (P-21). Nicht advised:

> The owners of International Color Printing Company are now quite definitely anxious to sell. *They can hardly sell without our consent and cooperation.* We have had many meetings among ourselves and with the representatives of ICP and Greater Buffalo Press. These meetings have up to this time involved the overall principles and not the many details.

The time has now come for us to decide what we want to do. If management prefers a carrying out of plan No. 3, I am prepared to proceed if given a green light. Even in this event, *there is a possibility of encountering opposition in the effort to protect the interests of KFS on every conceivable point under a long-term selling contract with the prospective owners.*

Greater Buffalo Press realizes they can hardly continue purchase plans without the approval of KFS and Greater Buffalo Press has indicated they would like to talk further with me about this quite conclusively next week. [*Ibid.*, emphasis supplied]

On June 13, 1955, Koessler wrote Nicht a detailed, formal letter setting forth "the provisions on which we are in agreement" (P-16).[6] These included, *inter alia:*

1) Greater Buffalo would purchase International and assume the long term printing agreement then being negotiated by International with King;

2) Greater Buffalo and King would each continue to hold its existing accounts;

3) With specified exceptions, Greater Buffalo would grant King exclusive sales rights on all new business; and

4) With one exception, King would give all its printing business to Greater Buffalo and International.

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[6] Koessler had sent Nicht a similar, less complete letter on June 2, setting forth "the points we discussed in New York, on which we agreed could go into a contract" (P-15).

The letter concluded: "This contract is to be for a period of ten years" (*Ibid.*).

On June 25, 1955, Greater Buffalo purchased International's stock for $575,000. Later that summer, International and King signed a ten-year contract, effective July 30, at substantially the same rates provided for in their previous contract (P-23; T. 1320-21). Eventually, in 1958, a contract designating King as Greater Buffalo's sales agent was executed by Koessler and Nicht, but not approved by the board of directors of either company, and never became formally effective. Notwithstanding Koessler's "understanding" with Nicht, Greater Buffalo, since the acquisition, while continuing to do most of King's printing, has taken substantial sales accounts from King (P-70).

After the acquisition, International, with financial support from Greater Buffalo, concluded arrangements for construction of a new plant in Sylacauga. The plant was opened in 1963 and is operated by Dixie Color Printing, a wholly owned subsidiary of Greater Buffalo (P-138, para. 21).

D. THE COURT'S DECISION

The district court rejected the government's contention that the acquisition violated Section 7 of the Clayton Act on two principal grounds. First, it found that the printing of color comic supplements directly for newspapers was a different market than the printing of such supplements for syndicates engaged in the sale of both features and comic supplement printing

to newspapers. It reasoned that to treat them as a single market would be to ignore "the tremendous leverage" which control of features affords the syndicates in selling such printing to newspapers (App. A, *infra,* p. 30). Having so defined the markets, the court found that Greater Buffalo and International had not been engaged in competition before the acquisition, since International printed solely for a syndicate, King (*Id.,* p. 36).

Although the court expressly found that "Greater Buffalo and King engaged in active competition for the business of printing color comic supplements" (*Id.,* p. 31), it made no attempt to assess the impact of the acquisition on that competition. It found that at the time of the acquisition, there was no agreement, either between King and Greater Buffalo or King and International, for a new printing contract for King's business. It concluded, therefore, that in acquiring International, Greater Buffalo simply took a calculated risk that it could obtain King's printing, and did not obtain by the acquisition itself a further share of the printing market (*Id.,* pp. 37–38).

Second, the court found that International, at the time of the acquisition, was a failing company (*Id.,* pp. 36–37). Its basis for this conclusion was that King, International's sole source of business, had been placing some business elsewhere and was threatening to increase this practice (which it could do by making use of the six-month cancellation clause in the contract) unless International built a southern plant. The court found that International lacked financing

for necessary expansion and modernization since it had a working capital deficit, its owners were unwilling to invest capital, and King was unwilling to enter into a new long-term contract at higher rates. Noting that King had refused to buy International, the court found that there was no other prospective buyer. The court also found that International became a healthy and profitable company after the acquisition because of technological improvements made possible by Greater Buffalo (*Id.,* p. 38).

Finally, the court suggested that even if there was a violation it was "insufficient to warrant a court's exercising its discretion to order a divestiture fifteen years after the occurrence of the alleged illegal conduct" (*Ibid.,*).[7]

THE QUESTIONS ARE SUBSTANTIAL

The effect of Greater Buffalo's acquisition of International was that the largest and most efficient integrated printer-seller of color comic supplements obtained approximately three-quarters of the industry's printing capacity, and also obtained the capacity and contract right to perform most of the printing for its leading sales competitor. In holding that this acquisi-

[7] In a concluding footnote, the court indicated its view that the real offender in the case was King. It observed that the evidence strongly suggested that King had utilized unlawful tie-in practices to restrict competition with Greater Buffalo in the sale of printing. The court pointed out, however, that it was without power to impose further relief against King, under the consent judgment entered against it, in the absence of a finding of violation of any antitrust law by Greater Buffalo (*Id.*, p. 41, n. 4).

tion did not violate Section 7 of the Clayton Act, the court defined the relevant product market in a narrow and artificial manner, considering only sales competition between the acquiring and acquired firms, while ignoring the substantial competition for sales of color comic supplement printing to newspapers between the acquiring firm and the sole customer of the acquired firm. It also upheld a failing company defense which did not satisfy the standards this Court has announced for that defense.

Because market definition is so important to Section 7 analysis, and the failing company defense is frequently invoked, this decision, if permitted to stand, is likely to have a seriously adverse effect on the government's efforts to enforce the antimerger statute. Moreover, only a finding of a Section 7 violation, implemented by an effective divestiture decree, offers hope for the restoration of meaningful competition in the color comic supplement printing industry. A divestiture order will also trigger the provision of the Hearst consent decree empowering the court to require King to quote separately its prices for feature rights and printing, thus effectively preventing anticompetitive tying agreements.[8]

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[8] The government agreed to the somewhat unusual conditional decree against Hearst in recognition of existing competitive realities. So long as Greater Buffalo controls King's printing, as a result of the International acquisition, a requirement that King quote a separate price for printing would substantially eliminate any ability King now retains to compete effectively for color supplement printing sales.

1. The relevant product market in Section 7 cases is determined by the nature of the commercial entities involved and the competition they face. *United States* v. *Phillipsburg National Bank,* 399 U.S. 350, 360; *United States* v. *Continental Can Co.,* 378 U.S. 441, 456–457. Color comic supplement printers produce their product for sale to newspapers which do not print their own comic supplements. Whether a printer sells his own product directly to newspapers, as Greater Buffalo did, or to a nonprinter seller for resale to newspapers, under an arrangement such as International had with King, the end-use of the product and the ultimate customers are the same. Greater Buffalo competed for printing sales with the International-King combination. The court below, by treating sales to syndicates as a different market from sales to newspapers, has confused distribution systems with markets, ignoring the realities of competition in the industry and between Greater Buffalo and International-King.

The court's conclusion that ownership of features rights gives syndicates such leverage over sales as to make syndicate selling of printing a separate market is refuted by its own express finding that King and Greater Buffalo were active competitors for the business of selling color comic supplement printing. In any event, "submarkets are not a basis for the disregard of a broader line of commerce that has economic significance." *United States* v. *Phillipsburg National Bank, supra,* 399 U.S. at 360. The line of commerce that is economically relevant to this case is

the sale of color supplement printing to newspapers which do not print their own supplements. In that line of commerce, Greater Buffalo, on the one hand, and International-King, on the other, were the leading competitors at the time of the acquisition.

The court's line-of-commerce error led it into the further error of analyzing the competitive effects of the acquisition solely in terms of competition between Greater Buffalo and International. It is, of course, well-settled that the competition which Section 7 seeks to preserve is not merely that between the acquiring and acquired firms. *Brown Shoe Co.* v. *United States,* 370 U.S. 284. In this case the competition most substantially and dramatically lessened by the acquisition was competition between Greater Buffalo and King in the sale of comic supplement printing.[9] In acquiring International, Greater Buffalo not only obtained control of some 75 percent of color comic supplement printing (see p. 9, *supra*), but also gained the almost certain right to print for King, its principal selling competitor.[10]

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[9] Paragraph 27 of the amended complaint, charging a Section 7 violation, alleged that competition between Greater Buffalo and King was eliminated. Paragraph 30(d), however, which described the effects of all the violations charged, alleged more generally that "competition in the printing and sale of color comic supplements has been suppressed." The government's trial brief emphasized the "combined printing and selling of supplements" as an appropriate line of commerce, and the lessening of competition between Greater Buffalo and King (Plaintiff's Post-Trial Brief, pp. 6-14, 17).

[10] The court found that Greater Buffalo, in acquiring King, did not acquire an additional share of the market because it had no assurance that King would continue to do business with

As a result of the acquisition, King has become dependent upon Greater Buffalo for most of the printing which it attempts to sell in competition with Greater Buffalo, and price competition between the two necessarily has been restricted. King, seeking a profit from printing sales, obviously cannot quote a price below that which it pays Greater Buffalo for printing; Greater Buffalo, in seeking to take accounts from King, has no incentive to bid below the price King pays it for the work. It is no answer that Greater Buffalo has taken accounts from King since the acquisition; existing competition between them, effectively restricted to sales at a price higher than Greater Buffalo charges King for printing, is not the fuller competition that could exist if King had an independent printing source. Cf. *United States* v. *Container Corp.*, 393 U.S. 333, 337. It can hardly be supposed that either would be inclined to compete so vigorously with the other as to jeopardize a mutually valuable customer-supplier relationship.

2. An acquisition which would otherwise violate Section 7 may be permitted if the acquired firm is a "failing company," that is, if its resources were so depleted at the time of acquisition and its prospects for rehabilitation so remote that "it faced the grave

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International. While Greater Buffalo may not have had a legally enforceable right to King's business following the acquisition, it certainly—in view of Koessler's letter to Nicht memorializing an agreement that Greater Buffalo would assume the new contract then under negotiation between International and King (P-16)—had very high and justifiable hopes at the time of the acquisition of obtaining King's business.

probability of a business failure," and if there was no other prospective purchaser for it. *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291; *United States* v. *Diebold, Inc.,* 369 U.S. 654, 655. The failing company defense in this case met neither requirement.

a. The district court concluded that International was failing at the time of its acquisition because it had a working capital deficit, its owners wished to sell rather than make the capital investment necessary to permit modernization and expansion, financing of such expansion had not been obtained from other sources, and King, its sole customer, was threatening to place some of its business elsewhere (App. A, *infra,* pp. 36–37). The court, however, ignored the consistent profitability of the company (including a substantial increase in profits in the year of the sale), and its continued ability to pay substantial dividends to its owners (P–141). Notwithstanding some technological obsolescence, International was the largest volume printer of color supplements (P–62) and King had not invoked or threatened to invoke the six-month cancellation provision in its contract. Moreover, expansion plans were being actively pursued even with assured financing (see pp. 7–8, *supra*).

This is scarcely the picture of a business facing imminent collapse. There is little doubt that International's growth and development had stagnated by reason of the owners' insistence on high dividends to the exclusion of reinvestment of profits, and that the

owners preferred a profitable sale to the commitment of capital for needed expansion and modernization. But it is equally clear that this still-profitable concern was an important competitive force in color supplement printing, performing vital services for its sole customer, King. Compare *United States* v. *Third Nat'l Bank of Nashville,* 390 U.S. 171, 175–176, 183.

Indeed, International's failure was hardly possible so long as King remained dependent upon International for printing, and had the power to prevent it. For nearly 30 years, King had relied upon International to print substantially all the color supplements it sold. Nicht's contemporaneous memoranda make clear that King followed closely the Greater Buffalo-International negotiations; the acquisition was not consumated until Nicht had a written commitment from Koessler that Greater Buffalo would continue to print for King, and King's market position would be maintained (P–21, 23, 15, 16).[11] Until such assurance was given, Nicht still considered either acquisition by King or renegotiation of the printing

[11] The district court did not view the Koessler letters as evidence of conspiracy between Greater Buffalo and King, apparently on the ground that Koessler was actually misleading Nicht as to his intentions to reach an agreement. (App. A, *infra*, p. 32). But for present purposes that consideration is irrelevant, since King, relying on Koessler's promises, obviously believed that its interests were protected in the Greater Buffalo acquisition, and therefore was not required to undertake other steps to finance the expansion of International.

contract at rates adequate to finance International's southern expansion as viable alternatives (P–21). Plainly King was in no position to permit any disposition of International which did not protect its long-term interests; it is simply not believable that in those circumstances it could or would have permitted International to fail.

b. In any event, the failing company defense is inapplicable unless the acquiring company is "the only available purchaser". *Citizen Pub. Co.* v. *United States,* 394 U.S. 131, 138. King is the only prospective purchaser, other than Greater Buffalo, to which International was ever offered. But there are numerous smaller color printers in the industry and acquisition by any one of them would have been substantially less anticompetitive (P–62). Nothing in the record indicates that these firms, or any others, were approached by International. Indeed, although the owners were apparently willing to sell as early as 1952 (T. 1301–03), there is nothing to show that International's availability was even made known generally to the trade. In these circumstances, there was no basis for the district court's finding that "no other person or corporation was interested in acquiring International * * *." (App. A, *infra*, p. 37). The finding reflects an erroneous legal standard of what the defense requires (see *Nashville Bank, supra*)—a defense that has a "narrow scope" (*Citizen Pub. Co., supra*).

The burden of establishing the failing company defense "is on those who seek refuge under it." *Citizen Pub. Co., supra,* at 138–139. Greater Buffalo did not satisfy that burden.

CONCLUSION

The questions presented are substantial, and of public importance in the enforcement of the antitrust laws. Probable jurisdiction should be noted.[12]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD W. MCLAREN,
Assistant Attorney General.

GREGORY B. HOVENDON,
LEWIS BERNSTEIN,
ELLIOTT H. FELDMAN,
Attorneys.

OCTOBER 1970.

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[12] If probable jurisdiction is noted, we reserve the right to argue (1) that the effect of the acquisition by Greater Buffalo of International may be substantially to lessen competition in the sale of color comic supplement printing and (2) that proper relief for the cure of that violation requires divestiture.

APPENDIX A

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

(Civil 9004)

UNITED STATES OF AMERICA, PLAINTIFF

v.

GREATER BUFFALO PRESS, INC., ET AL., DEFENDANTS

FINDINGS OF FACT

This action arises out of a complaint filed by the government in January 1961, charging certain defendants with violations of the Sherman and Clayton Acts. The complaint charged that Greater Buffalo Press, Inc. (hereinafter Greater Buffalo) engaged in a conspiracy with the Hearst Corporation (hereinafter Heart) and Newspaper Enterprise Association, Inc. (hereinafter NEA) to restrain interstate commerce in the sale of color comic supplements by refraining from soliciting printing business from each other's customers and by maintaining and stabilizing the price of color comic supplement printing in violation of section 1 of the Sherman Act. The complaint also charged the same defendants with engaging in a conspiracy to monopolize color comic supplements in violation of section 2 of the Sherman Act, and Greater Buffalo is charged with violation of section 7 of the Clayton Act (15 U.S.C. § 18) regarding its 1955 acquisition of the outstanding stock of defendant Interna-

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tional Color Printing Corporation (hereinafter International), since it is alleged that the acquisition constitutes a substantial lessening of competition and tends to create a monopoly with regard to color comic printing in the United States. Lastly, the defendants Hearst and NEA were charged with violation of section 3 of the Clayton Act (15 U.S.C. § 14), for allegedly selling comic features to newspapers at discounts on the condition that the newspaper purchasers shall not deal in comic printing services sold by their competitors. The litigation arises out of a claim filed with the Department of Justice on behalf of Atlantic Features that King Features was combining the licensing of its copyrighted features with the sale of the printing of the color comics in violation of the antitrust law.

After the complaint was filed, the defendant Hearst entered into a consent decree with the Department of Justice which in effect withdrew the charges against Hearst and provided that King Features may continue to engage in the practice of combining the sale of features and printing *until the court shall determine the antitrust issue as to Greater Buffalo.* The decree also provided that Hearst shall obey the antitrust laws during the pendency of the action. No reason has even been presented by the Department of Justice to explain the significant change of heart toward the defendant Hearst. Any attempt by the court to explain the conduct would be inappropriate in view of the court's lack of knowledge of the facts and circumstances surrounding that decision.

After the entry of the consent decree and prior to the taking of testimony, the government amended its original complaint by striking the allegation of monopoly against Greater Buffalo. There remain, therefore, conspiracy charges against NEA and

Greater Buffalo under sections 1 and 2 of the Sherman Act, an alleged violation of section 7 against Greater Buffalo arising out of the International acquisition, and a violation of section 3 of the Clayton Act against NEA regarding tie-ins.

Greater Buffalo is a New York corporation with facilities in Buffalo and Batavia and is in the business of commercial printing, including color supplements and color comic supplements for insertion in newspapers, and is engaged in the production of goods for shipment in interstate commerce. Southwest Color Printing Corporation (hereinafter Southwest Color) is a Texas corporation, having its principal place of business in Lufkin, Texas. Dixie Color Printing Corporation (hereinafter Dixie Color) is an Alabama corporation with its principal place of business and facilities at Sylacauga, Alabama. Both Southwest Color and Dixie Color are wholly owned subsidiaries of Greater Buffalo.

International is a Pennsylvania corporation, having its principal place of business and facilities at Wilkes-Barre, Pennsylvania. Prior to June 1955, its sole business consisted of the printing of color comic supplements for the account of King Features Syndicate (hereinafter King), a division of Hearst. Greater Buffalo acquired all of the common capital stock on June 25, 1955, and since that time it has been engaged in the printing of color comic supplements for the account of King and both color comic supplements and commercial printing on contracts held by Greater Buffalo.

NEA is a Delaware corporation, with its principal place of business at Cleveland, Ohio, engaging in the business of licensing copyrighted newspaper features, including color comic features, to newspapers, and selling color comic supplement printing of copyrighted

comic features to newspapers. Prior to 1955, NEA owned the stock of Buffalo Color Press, Inc. which owned and operated printing facilities in Buffalo, New York, and printed color comic supplements for NEA and one other newspaper. In 1955, its assets were sold to Greater Buffalo. Apart from its connection with Buffalo Color Press, NEA is not engaged in printing color comic supplements, but subcontracts such printing to other printers.

The Hearst Corporation is a Delaware Corporation with its principal place of business in the City of New York. It is engaged in the business of licensing copyrighted newspaper features, including color comic features, to newspapers through its New York division, King. It has also been engaged in the business of selling color comic supplement printing of copyrighted comic features to newspapers.

THE INDUSTRY

Color comic supplements are newsprint printed with colored ink containing reproductions of copyrighted color comic features, advertising material and other types of features. Each supplement page receives four impressions of ink which requires an exacting job of alignment and adjustment for each impression. A great deal of skill and expertise is necessary to be proficient in the printing of such supplements, and the higher the degree of skill, the finer the end product and more desirable the supplement in appearance and readability. Necessary to this process is the use of skilled personnel and stereotype equipment and other machinery.

Some newspapers print their own comic supplements. Many more are printed by color comic printing companies. The newspapers which do not print their own color comic supplements are capable of do-

ing so but have found it to be to their economic advantage to purchase them. There is every reason to believe that if at any time the cost of purchasing such color comic supplements exceeds the cost to the newspaper of printing them, the newspapers will do the printing themselves.

There are, therefore, three ways which a newspaper can obtain color comic supplements (hereinafter supplements):

1.Print its own supplements;
2. Contract directly with color comic printers; and
3. Contract with concerns which do not themselves print the supplements, but have arrangements with printers to print such supplements and deliver the same to newspapers.

Contemporaneously with contracting for the purchase of supplements, newspapers contract for the purchase of rights to the copyrighted comic features which appear in such supplements and, in general, the fees charged for the licensing of features are not pursuant to published price lists, but are arrived at after bargaining negotiations between the newspaper and the licensor. In attempting to obtain specific features, a newspaper is limited to those which are not already licensed under an exclusive arrangement with other newspapers in competition with it.[1]

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[1] The court takes judicial notice of the fact that, after the closing of testimony in this case, the Department of Justice filed a complaint in the United States District Court for the Southern District of New York in an action entitled "United States of America v. The Hearst Corporation" No. 67 Civ. 4598, which charges the Hearst Corporation with a violation of section 1 of the Sherman Act in that for the past many years it has entered into contracts through its King Features Syndicate Division with newspapers for the exclusive licensing of the features within an arbitrary and unreasonably broad territory surrounding the newspaper's city of publication.

For the past many years and continuing to this day, King has ruled the licensing portion of the color comic supplement industry. It controls the licensing of at least fifty copyrighted comic features, including the most popular comic features which are used by major metropolitan newspapers. Moreover, other features such as the writing of columns, which are essential to the circulation of large metropolitan newspapers, are controlled by King. Prior to 1955, King exercised dominant control over the printing of color supplements but since that time its position in the sale of printed supplements has been challenged by independent printers as well as syndicates.

Since approximately 1926, until very recently, Greater Buffalo has been owned, operated and controlled by Walter Koessler, now deceased, together fith his brother Kenneth and other members of his family. The growth of the company has been financed entirely out of earnings derived from the business. During this entire period of time, the business has grown and become a model of efficiency in the industry. This is due to the fact that Mr. Koessler personally developed the mechanical techniques for the rebuilding of color printing presses, including the system of pre-registry, which resulted in greatly increased efficiency in the operation of such presses and improvement in the quality of the product at reduced cost in printing. Walter Koessler was a mechanical genius. The improvements developed by him in the printing of color comics, although not protected by patents, have not been duplicated by any manufacturer of printing presses or any other printers and because of this Greater Buffalo has alone been able to make great strides in improving color printing presses. As a result, Greater Buffalo has at all

times enjoyed a distinct competitive advantage over other printers which is a result of the skill, diligence and efficiency of Walter Koessler and not the result of any illegal agreement or design to violate any provisions of federal law. The competitive advantage enjoyed by Greater Buffalo continues to this day. Greater Buffalo, as compared with King, has no control over the ownership of features and has never engaged in their licensing. Consequently, it has never been in a position to offer the smaller newspaper a so-called "ready-print" supplement section, which is a pre-printed supplement section supplied to many newspapers with only masthead changes, thereby sharing the printing among a number of newspapers which, because of the longer runs of this type of supplement, reduces to the individual newspaper the unit cost of such supplements. Both King and NEA are extensively engaged in this type of ready-print section. In recent years Greater Buffalo has obtained many contracts for the printing of color comic supplements solely by reason of its lower prices and the quality of its work. These contracts have come principally from newspapers previously engaged in printing their own supplements. The contracts provide for printing at uniform rates subject to cancellation by either party on ninety days' notice. They also provide that the transportation charges will be paid by the newspapers.

Prior to 1955 and to this day, all of the following companies, among others, have been and still are in competition with Greater Buffalo in the printing of color comic supplements, as well as the sale of such printing to newspapers and syndicates: Acme Color Printing Company, Eastern Color Printing Company, Star Color Printing Company, Southern Color Print-

ing Company, World Color Printing Company. There has been no evidence presented to this court which would support a conclusion that Greater Buffalo controlled such a share of the market as would tend to create a monopoly or monoply power. In recent years the color comic supplement industry has suffered from the competition of television; the substitution of other types of supplements, such as TV Topics, printed by the newspapers themselves; and the discontinuance of the publication of large numbers of newspapers. It is not a growing industry. The discontinuance of newspapers has resulted in a surplus of printing facilities and equipment, and this, together with the existing facilities of modern newspaper plants adaptable to the printing of color comic supplements, has minimized the barriers to entry into the color comic supplement printing industry.

Examining all the testimony and the relations between the parties, the court finds that the significant lines of commerce involved in this action should be divided into two distinct and separate categories: (1) the printing of color comic supplements for newspapers which do not print their own, and (2) the printing of color comic supplements for syndicates engaged in the sale of copyrighted comic features to newspapers. These are the lines of commerce—to treat them together as one line of commerce, i.e., the printing and sale of color comic supplements, would be to ignore the tremendous leverage of the syndicates which control the copyrighted features. The testimony of Walter Koessler and other witnesses in this case has established firmly that the syndicates, and in particular King, have a unique position by virtue of the legal monopoly which they have over the copyrighted features. The court is of the opinion that the peculiar

characteristics and business uses of copyrighted features justify considering printing for syndicates as a separate product market. See *Brown Shoe Co.* v. *U.S.*, 370 U.S. 294, 325 (1961).

THE CHARGES OF THE COMPLAINT

The evidence[2] indicates that Greater Buffalo and King engaged in active competition for the business of printing color comic supplements. Because of King's control over licensing of both comic and gen-

[2] During this trial, the court reserved decision concerning the admissibility into evidence of certain documents offered on behalf of the government. In general, these documents are memoranda circulated between executives of King and, in some cases, are personal memoranda of Mr. Nicht of King. Some of these documents have been offered on the theory that they embody statements of co-conspirators made in furtherance of and in the course of the conspiracy. Mindful that there must be independent evidence that the alleged co-conspirator was a member of a conspiracy before statements in furtherance thereof are admissible, and viewing the evidence in the light most favorable to the government—and viewing only the government's evidence, the court finds sufficient evidence to infer the alleged membership in the conspiracy which warrants the allowance of these documents into evidence. Greater Buffalo strenuously objects to the admission into evidence of both the memoranda of Nicht to his superiors and his memoranda for his personal files. Since these memoranda in the main concern events testified to by Koessler or verified as to substantial accuracy by Koessler, or in some instances concern subjects about which Greater Buffalo has offered similar exhibits (P-77–P-88) (Tr. pp. 1008–1010), the court admits those documents into evidence as being of some probative value concerning the state of mind of Nicht at the time the events took place. Cf. *United States* v. *Corn Products Refining Co.*, 234 Fed. 964–978 (S.D.N.Y. 1916), appeal dismissed on stipulation, 249 U.S. 621 (1918). See also *United States* v. *United Shoe Machinery*, 89 F. Supp. 349, 355 (D.C. Mass. 1950).

eral features, Greater Buffalo has been at a disadvantage in meeting King's competition. In certain instances, such as the Waterloo, Iowa, incident, the power of King to withhold the licensing of comic features to newspapers, to which Greater Buffalo was supplying the color comic supplements, required Greater Buffalo to make weekly payments to King to satisfy demands of Nicht, the chief executive officer of King. These payments were not made as the result of any agreement between Greater Buffalo and King with respect to the division or allocation of business or customers. Moreover, in some instances the newspapers themselves decided to split contracts between King and Greater Buffalo because of transportation savings which could be realized. Specifically, this was done by the Gannett papers for the Utica and Binghamton papers. Evidence that a customer has elected to divide his business for economic reasons does not establish an agreement between King and Greater Buffalo to allocate customers between them.

Between 1955 and 1958, Nicht attempted to secure an agreement restricting competition between King and Greater Buffalo. Koessler, knowing King's dominant position and its power over Greater Buffalo's customers, led Nicht to believe that Greater Buffalo was willing to negotiate such an agreement but, since Koessler was aware that such an agreement would be detrimental to Greater Buffalo, no agreement was ever reached with respect to monopolizing the printing and sale of color comic supplements, fixing prices, or allocating customers. Prior to 1955 and continuing to date, Greater Buffalo has competed with King and has obtained contracts from newspapers for printing formerly under contract with King and has been and still is in competition with NEA for the printing of

color comic supplements. Greater Buffalo's competition with NEA has been restricted, since Greater Buffalo has not been and is not engaged in the sale of ready-print sections which is NEA's principal source of business. The acquisition of the assets of Buffalo Color Press, Inc., a NEA subsidiary, by Greater Buffalo in 1955 has not affected the competition between NEA and Greater Buffalo, nor has the contract between the two for the printing of color comic supplements by Greater Buffalo for the account of NEA. Moreover, during this time King and NEA engaged in competition for the licensing of color comic printing and color comic features and the printing of color comic supplements. Greater Buffalo, printing for both concerns, received complaints from each with respect to the competition of the other and attempted to mediate such complaints. However, at no time did Greater Buffalo enter into an agreement or understanding with either with respect to allocation of customers or solicitation of each other's accounts.

Since Greater Buffalo's contracts with newspapers provided that transportation costs would be paid by the newspaper, Greater Buffalo has for many years attempted to locate and had made plans for the construction of printing plants in the deep south and southwest. This was both to accomodate its existing customers in those areas by providing lower unit cost per color comic supplement by cutting transportation costs and also to obtain new customers in these areas by providing a higher quality product at a lower unit cost. In furtherance of this policy, a printing plant was constructed in the early 1950's in Lufkin, Texas, by Southwest Color. The construction and operation of this plant was undertaken and financed

entirely by Greater Buffalo, and its establishment has resulted in transportation savings to newspapers in the southwest. Some printing business subcontracted by King for printing at the Lufkin plant since 1958 has been done pursuant to an arrangement between King and Greater Buffalo on the same price schedules which are available to other customers of Greater Buffalo for Lufkin printing. The subcontracting by King affords an economic advantage to King and its customers and is not in any way dependent or contingent upon any overall agreement between King and Greater Buffalo. The operation of the Lufkin plant by Southwest Color under the direction and control of Greater Buffalo has not restrained competition in the color comic printing industry, nor has it disadvantaged any other company in the industry or tended to create a monopoly.

The establishment of a printing plant at Sylacauga by Dixie Color was in execution of plans made by Greater Buffalo in 1947 and a commitment made in 1950 to its customers in the area. Construction and operation of the plant were undertaken and financed entirely by Greater Buffalo without any contribution by any other company in the industry. The establishment of that plant has effected transportation savings to newspapers in the south and preserved competitive prices in the area over the period since its construction.

The printing business placed by King for printing at the Sylacauga plant since 1963 has been produced pursuant to an arrangement between King and Greater Buffalo on the same price schedules which are available to other customers of Greater Buffalo for Sylacauga printing and are entirely different than the price schedules that prevail for the printing of King

Contracts at International. The printing business subcontract for printing at Sylacauga offers an economic advantage to King and its customers and is not in any way dependent upon any overall agreement between King and Greater Buffalo.

International had previously investigated construction of a plant at Sylacauga and had entered into negotiations with civic groups for a plant site and with the Coosa River Paper Company for a supply of newsprint, but it had never entered into any commitment to construct such a plant because it had no means of financing it. From the evidence it appears that the major stockholders of International were in no way desirous of investing further capital for the establishment of such an operation. The civic groups and the newsprint supplier were willing to transact business with any corporation prepared to finance and construct a plant. Although Greater Buffalo may have utilized to some degree the services of International officers after its acquisition of International, the funds advanced were from earnings generated by the innovations and improvements made by Greater Buffalo in the Wilkes-Barre plant. The advances were repaid prior to the time any claim was made by the government that the Sylacauga plant was an asset of International. Construction and equipment of the Sylacauga plant were carried out at the direction of Greater Buffalo and were in no way dependent on the services of International or any of its officers or personnel. At the time its construction was undertaken, Greater Buffalo had contracts with newspapers in that area, and its construction constituted a calculated business risk which Greater Buffalo alone was willing to undertake because of the supply of newsprint and the certainty of effecting transporta-

tion savings for Greater Buffalo newspapers in that area. The operation of that plant by Dixie Color has not restrained competition in the industry or tended to create a monopoly.

THE ACQUISITION OF INTERNATIONAL

Greater Buffalo and International have never been engaged in competition for the sale of color comic supplements to newspapers, since International has neither solicited nor held contracts with any newspapers. International's business was solely the printing of color comics for syndicates engaged in the sale of copyrighted comic features to newspapers. The acquisition by Greater Buffalo of International in 1955 was not the result of any agreement between King and Greater Buffalo and was neither suggested, aided or abetted by King or any of its officers or employees.

In 1955, at the time of its acquisition by Greater Buffalo, the resources of International were depleted to the extent that it had a deficit in working capital of $100,000. It had no means of securing financing for the construction of a southern printing plant and no means of moderizing its equipment. The owners of the corporation were anxious to sell the company and were continually demanding dividends in excess of the company's earnings. The owners were unwilling to invest capital toward expanding the operation of International or in any way investing in its development. The company's only customer (King) was placing some of its business with other printers, was threatening to take away more business, and was insisting on the construction of a substitute plant. The company's contract with King was cancellable on six months' notice, and it had been unable to negotiate a

new long-term contract at rates sufficient to enable it to finance improvements to other facilities and the construction of a southern plant. The company's resources were so depleted, and the prospect of its rehabilitation was so remote, that it faced the grave probability of a business failure. No other person or corporation was interested in purchasing International which was a failing company. Indeed, prior to its acquisition by Greater Buffalo, International had been offered to King, but King refused to negotiate for the purchase of the company at any price. Under these circumstances, in the light of its unwillingness to enter into a long-term contract with International at increased rates, there was nothing King could do to impede or prevent the sale of International to Greater Buffalo.

The acquisition of International by Greater Buffalo in 1955, had no reasonable probability of substantially lessening competition in the color comic supplement industry because International had no share of the market of printing color comics for newspapers and its failing financial condition foreclosed the possibility of its obtaining a share of the market and competing with Greater Buffalo. The business of King was in no way dependent upon International, since King had access to the printing facilities of Hearst and the facilities of independent printers.

At the time Greater Buffalo purchased International, there was no agreement between King and Greater Buffalo or King and International for a long-term contract, and Greater Buffalo undertook the calculated business risk of operating International without such a contract in the belief that by the installation of its more efficient methods, it could effect savings in cost for International sufficient to attract

the business of newspapers, as well as the syndicates, including King and NEA. Greater Buffalo did not acquire any additional share of the market of those engaged in printing color comics for newspapers which did not print their own by acquiring International.

Although, after the acqusition, International negotiated a long-term contract with King at substantially the same rates that had prevailed in its previous contract, that contract was not conditioned upon the acquisition of International by Greater Buffalo. The contract was negotiated by Gorman with little or no direction by Greater Buffalo. The court finds that after the acquisition Greater Buffalo vastly improved the facilities of the International plant by installing its improved methods of color printing. As a consequence of the improved methods and engineering skills of Mr. Koessler, International has operated at a profit since the acquisition and is a healthy economic unit. The acquisition by Greater Buffalo of International and its operation by Greater Buffalo over the past fifteen years have not resulted in the lessening of competition in the color comic supplement industry and, in fact, competition between Greater Buffalo, King, NEA, Southern, Acme, Eastern and the other companies engaged in the industry, has increased. Indeed, from all the evidence, it appears that the companies across the country have benefited, and that competition prevails in the industry unfettered by any agreement by any of the principals in this case.

In short, the evidence fails to factually establish the violations charged against the defendants. What meagre evidence there is which points to alleged violations would, even if highly credited, be insufficient to warrant a court's exercising its discretion to order a divestiture fifteen years after the occurrence of the alleged illegal conduct.

NEA AND THE ALLEGED TIE-INS CLAIMED TO HAVE VIOLATED SECTION 3 OF THE CLAYTON ACT

The government also charges that certain syndicates have illegally used the copyrighted comics by tying in the license to use the comics with the contract for printing the supplements. Newspaper Enterprise Association, Inc. is charged in paragraph 28 of the amended complaint with violating section 3 of the Clayton Act.[8] Although the court is of the opinion that, if proven, any agreement resulting in such a transaction as alleged would be a sale or contract for sale of goods or commodities encompassed within the purview of section 3, the court believes that the proof offered in this case would not support a finding of such an illegal tie-in.

The testimony and exhibits relied upon by the government in one portion of its tie-in proof, namely P–142 through P–146 and P–152 and P–153, concern negotiations which did not result in contracts with NEA for ready-print. Therefore, any price differentials which may have been reflected during these ne-

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[8] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 14 (1914).

gotiations could not support a finding of a violation of section 3, but could only be used as corroborating other evidence of tie-ins. *United States* v. *Loew's, Inc.*, 189 F. Supp. 373, 380 (S.D.N.Y. 1960), modified on other grounds, 371 U.S. 38 (1962). Furthermore, exhibits P–149, 150 and 151 are evidence that NEA on one occasion reduced the price of the ready-print to a publisher who subscribed to its intermediate service, showing only that if a tie-in existed, it would be of printing to the intermediate service—not to copyrighted comic features. Other proof indicated that NEA refused Mr. Hornady permission to sell NEA comics as its agent because he was the representative of three of NEA's competitors, a decision which seems eminently sensible. The government also points to a situation wherein NEA "threw in Oop" to meet competition on its contract with Ponca Oklahoma City News. Although a consummate transaction, the government failed to prove that this had a conditioning effect, and the evidence shows that Oop (Alley Oop) was already included in its make-ready. Its effect was beneficial to both the newspaper and NEA. Moreover, the evidence on all of the transactions offered in support of the tie-in charges indicates that price differentials which may exist are legitimately justified by cost considerations. In reaching this conclusion, the court has closely examined the proof concerning the ready-print process. The inclusion in ready-print of certain comics selected by NEA, which can be sold as a unit to many newspapers throughout the country, results in a spreading of fixed costs overall to newspaper customers and an economic advantage to NEA of a lower unit price than could be charged profitably if each supplement was printed separately for each newspaper. The court has also considered evidence tending to show that if any newspaper decides not to

buy the printing from NEA but wants any NEA comics, those comics are sold to the newspaper at the fair market price. Since a newspaper, in purchasing the ready-print, is limited to those features which NEA has previously selected and included in the ready-print, the price differential is justified by cost considerations and benefits to both the newspaper and NEA. The court, therefore, finds that the government has failed to prove the violation of section 3 of the Clayton Act regarding Newspaper Enterprise Association, Inc. regarding alleged tie-ins.[4]

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[4] This is not to conclude that the tie-in practice is not engaged in by certain syndicates controlling the licensing of color comics. The testimony at the trial of Mr. Koessler and others indicates that King Features had for a long period of time engaged in tie-in practices, and that such tie-ins seriously affected competition between Greater Buffalo and King. In fairness, it should be pointed out that King Features was not represented by counsel during these proceedings, did not cross-examine any witnesses regarding King's alleged tie-in practices, did not present evidence on its own behalf, or in any way take part in the trial, having previously agreed to a consent decree entered on the 31st day of August 1965. The terms of that decree provided in part: "V(B). Notwithstanding the making and entry of this final judgment, the plaintiff may, *if the court adjudicates that the defendant, Greater Buffalo, has violated any of the antitrust laws as charged in the complaint filed herein*, seek, and the court may order, such other relief as to the consenting defendant as the court may deem necessary and appropriate to dissipate the effects of the unlawful activities that may be found by the court, and to permit and restore competition in interstate trade and commerce in the printing and sale of color comic supplements . . ." [Emphasis added.] Since the court, as outlined in this memorandum, has not found the defendant Greater Buffalo violated any of the antitrust laws as charged, the court has no power under the terms of the judgment entered August 31, 1965, to enjoin the defendant Hearst from engaging in any tie-in practice which may be revealed by the evidence.

Conclusions of Law

1. This court has jurisdiction over the subject matter of this action between the parties.

2. Greater Buffalo and NEA have not engaged in any competition and conspiracy with Hearst or each other or any other person or corporation to refrain from soliciting color comic supplement business from one another's customers and to maintain and stabilize the price of color comic supplement printing in the United States.

3. Greater Buffalo and NEA have not violated section 1 of the Sherman Act as charged in the complaint.

4. Greater Buffalo and NEA have not engaged in any competition or conspiracy with King or each other or any other person or corporation to monopolize trade and commerce in the color comic supplement industry.

5. Greater Buffalo and NEA have not violated section 2 of the Sherman Act as charged in the complaint.

6. The acquisition by Greater Buffalo of International has not resulted and will not in the future result in a substantial lessening of competition or tendency to create a monopoly with respect to the color comic supplement industry, and such acquisition by Greater Buffalo did not constitute a violation of section 7 of the Clayton Act.

7. NEA has not sold comic features to newspapers at discounts, rebates or reduced prices on the condition, agreement or understanding that such newspaper purchasers shall not deal in the color comic printing services offered or sold by any competitor or competitors.

8. NEA has not violated section 3 of the Clayton Act as charged in the complaint.

9. The defendants, Greater Buffalo Press, Inc., International Color Printing Corporation, Southwest Color Printing Corporation, Dixie Color Printing Corporation and Newspaper Enterprise Association, Inc. are entitled to a judgment dismissing the complaint.

Enter judgment accordingly.

/s/ John O. Henderson,
JOHN O. HENDERSON,
United States District Judge.

MAY 26, 1970.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

(Civil Action File No. 9004)

UNITED STATES OF AMERICA
v.
GREATER BUFFALO PRESS, INC., ET AL.

JUDGMENT

This action came on for trial before the Court, Honorable John O. Henderson, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the complaint be dismissed as to defendants Greater Buffalo Press, Inc., International Color Printing Corporation, Southwest Color Printing Corporation, Dixie Color Printing Corporation and Newspaper Enterprise Association, Inc.

Dated at Buffalo, New York, this 26th day of May, 1970.

ROLAND E. LOGEL,
Clerk of Court.

APPENDIX C

[Filed: July 24, 1970]

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF NEW YORK

(Civil Action No. 9004)

UNITED STATES OF AMERICA, PLAINTIFF

v.

GREATER BUFFALO PRESS, INCORPORATED; THE HEARST CORPORATION; NEWSPAPER ENTERPRISE ASSOCIATION, INC.; THE INTERNATIONAL COLOR PRINTING COMPANY; SOUTHWEST COLOR PRINTING CORPORATION; AND DIXIE COLOR PRINTING CORPORATION, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY THE UNITED STATES OF AMERICA

Notice is hereby given that the United States of America, plaintiff herein, appeals to the Supreme Court of the United States from the judgment entered May 26, 1970, dismissing the complaint in this action.

LEWIS BERNSTEIN,
Attorney,
Department of Justice.

U.S. GOVERNMENT PRINTING OFFICE: 1970